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AUG - 8 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In The Matter Of )  
 )  
Definition of Markets for ) CS Docket No. 95-178  
Purposes of the Cable Television )  
Mandatory Television Broadcast ) DOCKET FILE COPY ORIGINAL  
Signal Carriage Rules )

To: The Commission

**COMMENTS ON PETITION FOR RECONSIDERATION AND/OR CLARIFICATION**

Costa de Oro Television, Inc. ("Costa"), the permittee of Station KSTV(TV), Ventura, California, by its attorneys and pursuant to Section 1.429(f) of the Commission's Rules, hereby submits its Comments on the Petition for Reconsideration and/or Clarification filed by Blackstar of Ann Arbor, Inc.

("Blackstar"), the licensee of Station WBSX(TV), Ann Arbor, Michigan, to the Report and Order and Further Notice of Proposed Rulemaking, 61 Fed. Reg. 29312 (June 10, 1996) ("Report and Order"). In support therefor, Costa states as follows.

1. The filing of petitions for reconsideration<sup>1</sup> of the Report and Order are necessitated by the Commission's failure to consider the impact of its decision on broadcast licensees. As Blackstar correctly notes, Section 76.55(e) of the Commission's Rules provides that television market assignments will be updated at three-year intervals, using the most recent market information available prior to the timing of updating. Had the Arbitron

<sup>1</sup> Costa has also submitted its Petition for Reconsideration of the Report and Order.

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Ratings Company ("Arbitron") remained in the television market ratings business, there is no doubt that updated information would have been made part of the 1996 must-carry elections. That Arbitron voluntarily chose to terminate the television ratings part of its business has led the Commission to consider how to deal with the definition of television markets for the 1996 election cycle.

2. Costa has argued in all of its pleadings in this proceeding that the failure of Arbitron to remain in the television ratings business should not prevent the Commission from using current television market information for the 1996 elections. Blackstar is right when it describes how it was relying on the 1996 updating process to secure the revision of its television market to the appropriate television market for the next three years. Costa, as well, relied on the updating language of Section 76.55(e) to obtain the correction of a blatant error in Arbitron's 1991-1992 Television ADI Market Guide ("1991-92 Market Guide"), the information source for the 1993 must-carry elections, that incorrectly listed it as a Santa Barbara ADI station rather than a Los Angeles ADI station.

3. Considering this, Costa remains at a loss to understand why the Commission chose expediency, in the form of maintaining the outdated 1991/1992 Arbitron ADI rankings, over using current information. This not only serves to ignore the hardship to broadcasters that were relying on changes that had taken place over the initial election cycle, but flies in the face of the

Congressional direction in the Section 301 of the Telecommunications Act of 1996 that the Commission utilize "a commercial publication which delineates television markets based on viewing patterns." The only commercial publication providing this information at the time the legislation was adopted was that published by Nielsen Media Research. Why would Congress have wanted the Commission to use a publication that had not been prepared for three years in the face of a current one?

4. In seeking reconsideration, Blackstar asks that the Commission clarify its decision by permitting stations to rely on the 1991-1992 Guide as supplemented by updated information. Costa is sympathetic to Blackstar's goal of eliminating the inequity in the Report and Order. Costa supports Blackstar's Petition to the extent that it demonstrates that the Commission's decision to continue use of the 1991-1992 Guide can have a capricious impact on some television stations. In reviewing Blackstar's Petition nonetheless, Costa urges the Commission to adopt a clearly defined category of exceptions to the Arbitron ADIs that can be utilized by stations uniquely harmed by the use of outdated (and in the case of Costa, incorrect) Arbitron data. Such exceptions can be implemented without wholesale re-drawing of television markets.

5. The starting point for an exception policy has to be Blackstar's observation that the 1996 must-carry election process should take into account changes in television market information that were relied upon by a station, that involve errors by

Arbitron, or do not result in a material variance from the 1991-1992 Guide. Costa submits that these are a limited number of exceptions and provide a safety valve for those stations that would suffer injury by the Commission's failure to provide the updating that it itself pledged in adopting Section 76.55(e). Report and Order in MM Docket No. 92-259, 8 FCC Rcd 2965, 2975 (1993).

6. The three exceptions are each necessary and proper. The first addresses the situation presented by Blackstar. As stated by Blackstar, Arbitron had advised the station that it was revising its market guide to return Blackstar's station to the Detroit ADI. Blackstar has documentation in this regard and would qualify under the standard.

7. The second prong addresses concerns that Costa has raised. Costa has consistently argued to the Commission that its placement in the Santa Barbara ADI represents an error on Arbitron's part. The evidence presented by Costa in Costa de Oro Television, Inc, 1 CR 227 (1995) (petition for reconsideration pending), is that the permittee never requested placement in any ADI other than Los Angeles and that Arbitron is unable to locate any evidence whatsoever in support of its claim that such a request was made. Thus, Costa would be allowed to consider itself a Los Angeles ADI station owing to the error in the 1991-1992 Guide.

8. Both Blackstar and Costa would qualify under the third prong of the exceptions test. That prong provides an exception

for a change in market for a station that would not represent a material variance from the 1991-1992 Guide. As Blackstar's station would have been considered a Detroit ADI station for the 1991-1992 Guide, because the Detroit ADI was where it would be located but for a request to be considered outside the ADI, allowing it to be deemed in that market for 1996 election purposes does not represent a material variance. Likewise, Station KSTV(TV) is licensed to Ventura, California, in Ventura County, California. Ventura County was, in 1991-1992, and is now, a county within the Los Angeles ADI and DMA. Treating it as a Los Angeles market station, as Nielsen does for DMA purposes, does not involve any material change in the market.

9. In deciding not to adopt the Nielsen DMAs, the Commission concluded that to do so would create huge disruptions, as 120 of the approximately 200 television markets would have to be re-drawn, as numerous counties in each market would move from one market to another because of the differing methodologies in determining markets adopted by Arbitron and Nielsen. Costa's case, requiring an exception to allow its use of DMAs, is far different. Costa does not ask the FCC to re-draw the Los Angeles market. Rather, it asks the FCC only to take its station, which is licensed to Ventura County, located in the Los Angeles market, and put it back where it belongs, rectifying the error which occurred when it was moved to the Santa Barbara market by Arbitron prior to 1991, a move that even Arbitron cannot substantiate.

10. The adoption of this set of exceptions is consistent with the policy enunciated in the Report and Order. In the Report and Order (Para. 46), the Commission indicates that Nielsen Media Research Designated Market Areas ("DMA"), which will take over from ADIs in the 1999 must-carry elections, are useful in cases involving Section 614(h) exceptions for revisions of market boundaries based on changes in viewing patterns and market conditions. Costa submits that DMA evidence should be used by the Commission in confirming exceptions under the test being proposed herein.

11. While Costa remains uncomfortable with the Commission's failure to adopt current DMAs in place of outdated ADIs, it believes that the harmful results can be ameliorated by the adoption of a modification of the clarification requested by Blackstar. In acting to permit parties that would suffer identifiable harm from the continued use of the outdated information, the Commission will accomplish its goal of an orderly transition to a DMA-based scheme with a safety net for those stations that cannot await the 1999 round of elections. Further, the exceptions will not result in material disruption to the television market scheme. While there are stations that will be affected, a review of the pleadings filed in CS Docket No. 95-178 do not evidence that the number is so numerous as to cause any significant difficulties for cable operators or the Commission. Therefore, it is imperative that the Commission reconsider the Report and Order and adopt the clarifications

provided for herein.

WHEREFORE, it is respectfully requested that the Commission reconsider its Report and Order in CS Docket No. 95-178 and adopt the following additional Note:

Note: For the 1996 must-carry/retransmission consent election, the 1994-95 DMA Market and Demographic Rank Report published by Nielsen Media Research may be used by broadcast stations that: (i) have documentation evidencing that the television market the station is located had received a decision made by Arbitron Ratings Company to change the television market for the 1993-94 Television ADI Market Guide; (2) can establish that Arbitron Ratings Company had no documentation evidencing the ADI placement of the station in the 1991-92 Television ADI Market Guide; or (3) that the television market being requested for the Station based on the 1994-95 DMA and Demographic Rank Report is consistent with the 1991-92 Television ADI Market Guide.

Respectfully submitted,

**COSTA DE ORO TELEVISION, INC.**

By: 

Barry A. Friedman

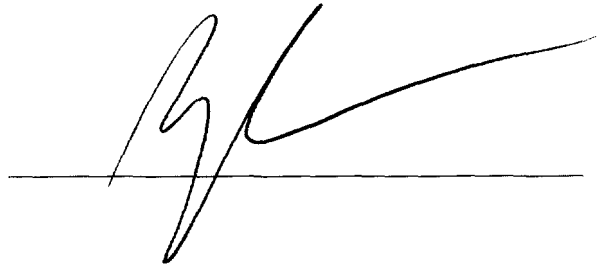
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Dated: August 8, 1996

CERTIFICATE OF SERVICE

I, Barry A. Friedman, do hereby certify that I have, on this 8th day of August, 1996, served a copy of the foregoing, "Comments on Petition for Partial Reconsideration and/or Clarification," on the following party by first-class mail, postage prepaid:

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A handwritten signature in dark ink, appearing to be 'BAF', is written over a horizontal line.